IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 164
5322144

BETWEEN	ANDREW VAN DEN ENDE Applicant
AND	THE VINTAGE AVIATOR LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Vicki Eades for the Applicant Peter Churchman for the Respondent
Investigation Meeting:	15 September 2011 at Wellington
Submissions Received:	By 6 October 2011
Determination:	31 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Andrew van den Ende, claims that he was unjustifiably disadvantaged in his employment and then unjustifiably dismissed. The respondent, The Vintage Aviator, considers that as Mr van den Ende had assaulted a fellow worker and otherwise mis-conducted himself in his employment (conclusions that a fair and reasonable employer would have reached) his dismissal was justified, and that he was otherwise fairly treated throughout his employment.

Factual discussion

[2] Ms Fiona Birkbeck is an accountant for a number of companies associated with The Vintage Aviator. She was also the first point of contact on human resources

matters for The Vintage Aviator. The Vintage Aviator is, as it name implies, a company that restores vintage aircraft.

[3] On 17 June 2010 Ms Birkbeck became aware of an incident in the welding division when a Mr Vince Stephens appeared in her office, his trousers torn and bleeding from his ear. He claimed to have been pushed into moving machinery in the linishing room by the welding supervisor, Mr van den Ende. Ms Birkbeck also soon became aware that Mr Stephens had in fact thrown a metal bracket at Mr van den Ende, which hit him in the eye. As a result both workers had to seek medical attention off site. Mr Stephens had a lacerated ear and bruising to his leg. By contrast Mr van den Ende was far more seriously injured, with significant damage to his eye where the metal bracket had hit him. Even today he remains unable to work and is on ACC.

[4] Ms Birkbeck, Mr Gene de Marco (The Vintage Aviator's Production Manager) and its Human Resources Manager were appointed as the investigatory panel to look into the behaviours of both Mr Stephens and Mr van den Ende, which were treated as two separate disciplinary investigations. Mr Stephens was summarily dismissed as a result of the investigation into his conduct.

[5] The parties' employment agreement deals with termination for serious misconduct, which includes but is not limited to *harassment of a work colleague or customer; assault; deliberate destruction of any property belonging to the employer;* and *conduct prejudicial to good order and morale.*

[6] Mr van den Ende's job description included as one of its goals a safety statement, the primary objective of which was to protect customers and staff. The Ninth Guiding Principle is recognition that work colleagues may see things differently and that if *we look and understand others for their individuality we will work together well as a team.*

[7] Clause 13.3 of the agreement provides for suspension, and it states:

> *In the event the employer wishes to investigate any alleged misconduct, it may, after discussing the proposal of suspension with the employee, and considering the employee's views, suspend the employee on pay whilst the investigation is carried out.*

[8] The Vintage Aviator also has a misconduct and poor performance policy, which sets out how disciplinary issues will be dealt with. Steps 7 – 9 deal with disciplinary investigations. They state:

> ***Step 7: Due consideration***
> *The meeting will be adjourned to consider the explanation of the employee. Further investigations will be conducted if required.*
>
> ***Step 8: Decision***
> *... If the manager ... determines that the allegation is substantiated, based on reasonable probability, the manager shall decide on the appropriate form of disciplinary action ...*
>
> ***Step 9: Implementation***
> *The manager, or his/her representative, will then call a meeting to convey the decision to the employee. The employee is entitled to be represented or have another employee present as a witness. After the meeting the decision will be confirmed in writing.*

[9] The investigatory panel first undertook some preliminary investigations. Mr de Marco took photographs and measurements of the area where the altercation had taken place. In particular, Mr de Marco measured the linishing room in question and noted that the height of the wheel that had fallen off was around the level of where Mr Stephens' trousers had been ripped.

[10] Written statements from workers in the vicinity, except from Mr van den Ende, who was receiving treatment at the hospital, were also taken.

[11] Ms Birkbeck wrote the same date suspending Mr van den Ende until the completion of The Vintage Aviator's investigation.

[12] The next day Mr van den Ende was sent a memo which stated:

> *Yesterday, June 17th, there was an incident between yourself and Vincent Stephens which resulted in you both requiring medical treatment off site and damage to company property. As you are aware you are now suspended on full pay while we investigate what happened.*
>
> *We now have photographs of damage to the door that was repeatedly kicked, and statements from witnesses. At this stage you have chosen not to provide us with a statement despite being given the opportunity to do so.*
>
> *I have enclosed copies of the photos and statements for your information. ...*
>
> *I am giving you notice to attend a meeting on Tuesday 22nd June at 11am in the conference room at Vintage Aviator to give you the*

> *opportunity to discuss and defend the allegations made against you. …*
>
> *I would like to strongly emphasise that the Company regards allegations of wilful destruction of company property, aggression, violence, intimidation and threatening behaviour as a matter of serious misconduct and will consider this during the hearing. Violent action towards any other member of staff (contractor or employee) is considered serious misconduct. Incidents of serious misconduct could result in appropriate disciplinary action being taken against you; this could range from a warning (verbal, written or final) through to dismissal.*

[13] While Mr van den Ende may not have believed that his job was at risk at this point, it is certainly not apparent to an independent observer why, given the clear terms of the memo.

[14] Two "independent" witness statements indicated that Mr Stephens had failed to shut the door to the linishing room as required, and that Mr van den Ende had accordingly kicked the door shut on several occasions, but neither had observed any assaults by one on the other.

[15] Mr van den Ende did provide his own written statement. It states, *verbatim*, amongst other things:

> *After what happened last Thursday morning I am disgusted and annoyed at Vince and myself because it was avoidable.*
>
> *After telling Vince, for the third time that morning to close the door to the linishing room, he never so I slammed the door close, it came flying back open against the wall and window, I slammed the door again and it came flying back open, I closed the door again and started to walk away, I heard it open again, so I turned around and a metal bracket was thrown into my face on purpose. I fell to my knees calling for help as I could not see. Vince just walked away and left me there.*
>
> *In Elliott's statement, if he seen what happened, I closed the door from the outside, so I didn't enter the linishing room, so I don't know how Vince has hurt himself …*
>
> *I am not a violent or aggressive person, in the six years that I have worked for Gene I have had no confrontations with fellow staff.*
>
> *You have sent me 17 pictures of the door. We know in there that the doors when slammed from the suction of the extractors and breeze from the workshop fall apart. The wood flashings and windows pop out, and we repair it. So to say we have damaged company property is not true.*
>
> *Yesterday I was in hospital all day. …*

> *What Vince has done to me, by throwing a metal object into my eye on purpose when I wasn't looking is a gutless and lowlife act.*
>
> *I have four children and wife, they are all sickened by this act, and want revenge. …*
>
> *I am in pain so I am going to bed where I should be resting.*

[16] Mr van den Ende declined to be represented at the investigation meeting on the 22nd of June. It was re-emphasised how serious the matter was being considered by The Vintage Aviator. He then read out his written statement. Mr van den Ende made it clear that he never entered the linishing room, so he had not pushed Mr Stephens, and thus Mr Stephens must have injured himself. He also updated The Vintage Aviator on his medical situation, and that he was considering pressing assault charges against Mr Stephens, which has yet to occur.

[17] The parties then attempted to discuss the altercation, but it soon became apparent that Mr van den Ende was unable to discuss matters fully, because of the extent and ongoing nature of his injuries.

[18] A further meeting then took place on 1 July. At this meeting Mr van den Ende once again chose not to be represented. He was asked why the door was being kicked shut by him and his response was that Mr Stephens was kicking it open and he wanted it closed. He was asked why he had aggravated the situation, rather than walking away. He replied that he was frustrated because Mr Stephens wasn't listening to him. Mr van den Ende was questioned about his statement that he didn't push Mr Stephens, even although his injuries supported the fact that he had been pushed into the machine. Mr van den Ende's response was that Mr Stephens was lying about that.

[19] Mr van den Ende noted that he enjoyed his job and had a good record, and that he would not do anything to jeopardise his position with the company. Mr van den Ende then agreed to make himself available if further clarification was required, which as it turned out it was not. I accept that he agreed to have the final decision conveyed to him without him having to attend another formal meeting, as it was highly inconvenient for him to come into work, given his serious eye injury, especially if the purpose of the meeting was simply to relay The Vintage Aviator's decision. If, by contrast, further discussions with him were required, Mr van den Ende had agreed to make himself available for them.

[20] The next day Mr van den Ende was rung by Ms Birkbeck, who told him that he was to be dismissed, that he would be paid out his final pay and that this would be covered off in a letter to him.

[21] On 2 July Ms Birkbeck sent a letter to Mr van den Ende outlining his proven misconduct, which was said to be a severe example of serious misconduct. The letter states:

> *We are particularly concerned that as a senior member you acted to escalate the situation rather than take the lead and defuse it. After much consideration of all the statements and the minutes of the hearing we have come to the decision of dismissal.*
>
> *Our trust and confidence in you as an employee has totally and irrevocably broken down. We have a legal and moral obligation to provide our employees with a safe workplace and your behaviour is in direct contravention of that. Therefore the company has no choice but to terminate your employment effective from this date.*

[22] The Vintage Aviator Limited management made this decision as they rejected Mr van den Ende's claim that Mr Stephens had thrown himself into the machine rather than being pushed. I note for the record that there was also the possibility that Mr van den Ende kicked or pushed the door shut, hitting Mr Stephens, who then fell onto the machine. This would not change a conclusion of serious misconduct however, because to push or kick a door closed so hard as to injure another worker against a machine a metre or so away is reckless and dangerous behaviour of the most serious kind.

[23] The Vintage Aviator Limited also took into account the fact that Mr Stephens had not tried to minimise his own conduct, and they therefore had no reason to disbelieve his view of events because he had accepted that he had attacked Mr van den Ende. The Vintage Aviator also took into account the fact that Mr van den Ende, unlike Mr Stephens, was a senior employee and a supervisor, who could have done more to avoid this issue, such as take the issue to Mr de Marco as the manager of the workshop.

[24] Much was made at the investigation meeting by Mr van den Ende that Mr Stephens had a history of self harm in order to avoid responsibility for his actions. No direct evidence was provided, however, of any such examples and I accept The Vintage Aviator's management evidence that they had never heard of such issues before.

[25] The parties have attended mediation and attempted to resolve matters in the course of the investigation meeting, but were unable to do so. It therefore falls to the Authority to make a determination.

The law

[26] Section 103A of the Employment Relations Act provides for the Authority to determine, on an objective basis, whether a dismissal or other action is unjustified. The Authority does so by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. As was made clear in *X v. Auckland District Health Board* [2007] ERNZ 66, two separate considerations are required, namely:

> *What the employer did (a substantive dismissal for justification and the grounds for it); and*
>
> *How the employer acted (the process leading to those outcomes).*

[27] The two types of assessments often overlap, see for example *Madden v. NZ Railways Corporation* [1991] 2 ERNZ 690. Where allegations of misconduct are particularly serious, then the evidence in support of such allegations must be as convincing in its nature as the charge is grave (*Honda NZ Limited v. NZ (with exceptions) Shipwrights etc. Union* [1990] 3 NZILR 23 (CA)). On the other hand an employer is not required to *conduct a formal hearing in the nature of a trial* (*Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd* [1990] 3 NZILR 584 (CA)).

[28] In *Chief Executive of the Department of Inland Revenue v. Buchanan and Symes (No.2)* [2005] ERNZ 767, the Court of Appeal held that what was necessary in the test for serious misconduct was an evaluation of whether a fair and reasonable employer would characterise the offending conduct as deeply impairing or destructive of the basic confidence and trust essential to the employment relationship thus justifying dismissal. It is not the role of the Authority, however, to substitute its decision for that of the employer, even if a later more thorough investigation by it may have led to a different conclusion to that reached by the employer at that time.

[29] An employer is not required to run a two step disciplinary procedure – the first being on liability and the second on penalty (*Unitec v. Henderson* unreported Colgan CJ AC12/07 19 March 2007). Rather it is required as a matter of fairness to ensure that an employee had a fair opportunity to make submissions on the outcome of its investigations, including penalty.

[30] The Authority has no power to award exemplary damages. It is also statute barred from awarding Mr van den Ende any remedies in respect of the injuries caused to him, including lost remuneration, even though they occurred as a result of activities that took place at work, because of the accident compensation system. Instead any issues he has with The Vintage Aviator over workplace safety can only be addressed with the Department of Labour, and those with Mr Stephens with the Police.

Determination

[31] While the grievance was raised for unjustified dismissal only, the content clearly covered the claim of disadvantage to Mr van den Ende over his suspension without consultation. This was clearly extended to disadvantage in the statement of problem and was never challenged by The Vintage Aviator until final submissions. I conclude that it has in effect thereby consented to the late raising of a separate disadvantage grievance or that the grievance is, pursuant to s.122, of a type other than alleged.

[32] I accept that Mr van den Ende was unjustifiably disadvantaged because he was suspended in breach of the terms of his employment agreement. The terms of the employment agreement are abundantly clear and are as much binding on The Vintage Aviator as Mr van den Ende. It may not have suited The Vintage Aviator to have a separate meeting with Mr van den Ende to get his views about suspension before suspending him, but that is not the point. Mr van den Ende was entitled to be treated in accordance with the terms of his employment agreement, particularly as suspension is such a drastic action to take against an employee. It came as a great shock to him that he was being excluded from the workplace.

[33] However, Mr van den Ende was paid throughout his suspension and he was unable to return to work in any event. He gave no great evidence on the impact of the suspension on him. In those circumstances I consider that compensation of $1,000 is appropriate. There can be no deduction for contribution for the failure by The

Vintage Aviator to consult with him over the suspension because that his not his decision and he was off site and unable to return to his duties in any event, and therefore posed no threat to the company or its staff at that time. There is no need for any penalty to flow from this breach of duty, as Mr van den Ende has been compensated appropriately.

[34] In considering the claim for unjustified dismissal, I turn first to how the employer acted. The Vintage Aviator was within its rights to allow Ms Birkbeck to be part of the investigatory panel. She had seen Mr Stephens' injuries first hand, but that is not an exclusory factor when she was only one of three investigators, The Vintage Aviator is a small company, and there was no evidence of bias by her against Mr van den Ende.

[35] I do not accept that The Vintage Aviator was required to undertake any further investigations than it did. Mr van den Ende's statement that he believed Mr Stephens had injured himself is not backed up by any credible evidence upon which The Vintage Aviator could have investigated at the time. I also accept that it asked the other staff if they knew whether Mr Stephens could have injured himself but was given no such information. An employer is not required to inform an employee of a response that brings forwards no new information. Furthermore, Mr Stephens admitted that he had wrongly informed a co-worker that Mr van den Ende had bitten him, so no further enquiry was required in the circumstances.

[36] In the circumstances of this case there was no requirement to advise Mr van den Ende of a preliminary decision to terminate his employment, nor was The Vintage Aviator required to hold a separate meeting to mitigate a finding of serious misconduct. Mr van den Ende did put forward his long incident free service as grounds that he should not be dismissed, and all such mitigating factors were taken into account by The Vintage Aviator management. Thus he had a fair opportunity to, and did, make submissions on all possible issues, including penalty (*Henderson* applied).

[37] While I accept that The Vintage Aviator management could have explained explicitly to Mr van den Ende that the heights of the machine wheel and the bruise on Mr Stephens' leg were at the same height that was not a matter of any great significance upon which Mr van den Ende could have usefully commented, other than as he did. The same goes for not giving him all the photos and diagrams used,

particularly as Mr van den Ende was very familiar with the linishing room. Thus if there were a procedural breach it was one of minimal significance.

[38] I also accept that Mr van den Ende was not too unwell to be interviewed on the two occasions he was. First, he did not so complain at the time. Second, the first meeting was cut short by The Vintage Aviator management for that very reason.

[39] Finally, I accept that Mr van den Ende waived his right to have a separate meeting to be informed of the decision to dismiss him.

[40] I turn now to what the employer did (i.e. the substance of its decision). I accept that the key consideration for The Vintage Aviator was the assault allegation and the implications thereof, not any damage to company property. Furthermore, the letter of dismissal, while apparently setting out more findings than had originally been alleged in the disciplinary meeting letter, in actual fact the findings all relate to the same incident, and just set out the clear implications of a finding against Mr van den Ende on the main issue of assault.

[41] Even following the full investigation meeting there is only speculation, rather than evidence, that Mr Stephens harmed himself in order to avoid responsibility for the cowardly action of throwing the bracket at Mr van den Ende, rather than his injuries occurring as a result of Mr van den Ende's actions.

[42] Similarly, I accept that it was reasonable for The Vintage Aviator to conclude that Mr Stephens would not have had time to injure himself after the incident. The only two eye witnesses to this matter were Mr van den Ende and Mr Stephens, and Mr van den Ende was unlikely to have been in any state to judge that issue. A more likely explanation, as accepted by The Vintage Aviator management, was that Mr van den Ende had pushed Mr Stephens, who fell against the machine.

[43] While it is probably just as likely (if not more) that Mr Stephens was injured as a result of Mr van den Ende slamming or kicking the door shut, which had the effect of pushing Mr Stephens into the machine, rather than Mr van den Ende doing so by directly pushing him, either is equally serious a breach of his employment agreement. He was not employed to slam or kick doors shut in a confined environment, sending a worker into a dangerous moving machine. Under this scenario the injuries to Mr Stephens would still have resulted from Mr van den Ende's actions, and such actions were in clear breach of his employment agreement, particularly as he

was a senior member of staff as welding supervisor. No doubt he wanted the door closed for health and safety reasons, but slamming it or kicking it shut in circumstances where another worker became injured is a far more serious breach of health and safety than the one he was trying to stop.

[44] I therefore conclude that The Vintage Aviator's decision that Mr Stephens did not injure himself was what a fair and reasonable employer would have concluded in all the circumstances. The former is an inherently unlikely explanation without proper evidential foundation to support it, such foundation neither being provided by Mr van den Ende at the time, nor at the investigation meeting.

[45] Once Mr van den Ende's explanation was reasonably rejected, a finding of serious misconduct followed as night follows day, and in such circumstances a fair and reasonable employer would have dismissed Mr van den Ende.

[46] I therefore conclude that what The Vintage Aviator Ltd did by dismissing Mr van den Ende and how it acted, i.e. the process it followed, were what a reasonable employer would have done in all the circumstances at the time.

[47] I therefore dismiss Mr van den Ende's claim for unjustified dismissal.

Conclusion

[48] Mr van den Ende's claim for unjustified action for failure to consult him over his suspension is upheld. I therefore order the respondent, The Vintage Aviator Limited, to pay the applicant, Mr Andrew van den Ende, the sum of $1,000 compensation under s.123(1)(c)(i). Mr van den Ende's claim for unjustified dismissal is dismissed.

Costs

[49] Costs are reserved.

G J Wood
Member of the Employment Relations Authority